Supreme Court, U. S.
FILED
SEP 23 1977
MICHAEL RODAK, JR., CLERK

No. 77-127

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MICHAEL W. FARRELL,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 5

Conclusion 11

CITATIONS

Cases:

Brady v. *Maryland*, 373 U.S. 83 ..... 1, 5, 6, 10, 11

Giles v. *Maryland*, 386 U.S. 66 10

Mattox v. *United States*, 146 U.S. 140 11

McDonald v. *Pless*, 238 U.S. 264 11

United States v. *Agurs*, 427 U.S. 97 10

United States v. *Ross*, 511 F. 2d 757; certiorari denied, 423 U.S. 836 10

United States v. *Ruggiero*, 472 F. 2d 599, certiorari denied, 412 U.S. 939 10

Statutes and rule:

Jencks Act, 18 U.S.C. 3500 ..... 1, 5, 6

18 U.S.C. 371 2

18 U.S.C. 1709 2

Federal Rules of Evidence, Rule 606(b) 11

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-127

DAVID WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1977. The petition for a writ of certiorari was filed on July 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C: 1254(1).

QUESTION PRESENTED

Whether the government violated its obligations under 18 U.S.C. 3500 or *Brady* v. *Maryland*, 373 U.S. 83, by failing to provide petitioner either with the grand jury testimony of a government witness or a form that petitioner had filed with the Internal Revenue Service.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to embezzle and embezzlement of 12 parcels of mail, in violation of 18 U.S.C. 371 and 1709.[1] He was sentenced to two concurrent terms of three years' imprisonment and was fined $12,000 (Pet. App. 6a-7a). The court of appeals affirmed (*id.* at 1a-2a).

The evidence showed that petitioner was the central figure in a conspiracy to embezzle mail parcels from the Airport Mail Facility at John F. Kennedy International Airport (AMF) in New York, where he was employed as a supervisor, and that he enlisted the aid of co-defendants Helen Helton and Rosario Marchione and other postal employees to execute the scheme. In early September 1975, petitioner had several conversations with co-defendant Helton (who was petitioner's lover) in which he solicited her assistance in stealing mail from the Registry Section of AMF, where she worked (Tr. 124-130). At approximately the same time, petitioner asked Anthony Short, a postal worker whose duties included transporting mail from the AMF to various airlines for delivery, whether he would be willing to take a bag of mail out of the airport and deliver it to petitioner in return for $100,000 (Tr. 51-52). In a telephone conversation recorded by Short, petitioner outlined the entire scheme to embezzle mail from the Registry Section (Tr. 53-54; G. X. 4), telling Short that he did not know exactly when the theft would occur since it was "gonna have to be the right time" (G. X. 4). At the behest of postal inspectors, to whom Short related this information and provided the

[1]Co-defendants Helen Helton and Rosario Marchione pleaded guilty to the conspiracy charge and testified for the government at petitioner's trial.

tape recording, Short thereafter met with petitioner to select a place for transfer of the mail bag that Short was to remove from the airport (Tr. 70-73).

Meanwhile, petitioner was completing arrangements for the theft with Helton. He instructed her to assemble a mail bag from the "valuable cage" (vault room) of the Registry Section, secure it with a conventional lock (rather than the required "rotary" lock),[2] and deliver the bag to him for removal (Tr. 129-130, 140, 243). On two occasions prior to the theft, petitioner asked Helton whether she "had anything"; her response each time was negative because she hoped that the scheme would never be executed (Tr. 132).

On September 22, 1975, petitioner was assigned to substitute for the supervisor of the Registry Section. Between 4:00 a.m. and 5:00 a.m. on that day, petitioner left his post and went upstairs to the AMF lunchroom, where he approached co-defendant Marchione, a transfer clerk, told him that a mail bag going from Miami to the British West Indies had arrived during the prior duty shift, and asked whether Marchione was willing to participate in the theft. When Marchione expressed interest, petitioner told him to go downstairs (Tr. 311-316).

Sometime after 5:00 a.m., petitioner asked Helton whether she had "heart," *i.e.*, whether she was ready to assemble a bag of mail for petitioner to remove from the airport (Tr. 134-135). Helton then went to the vault room and signed out 12 parcels of mail (Tr. 135-136, 177-181). From their markings and tags, Helton knew that ten of the parcels had been sent by banks in Milan, Italy, and that two were from Grenada, British West Indies;

[2]The numbers on a rotary lock change each time the lock is opened and closed (Tr. 121).

all 12 were destined for New York banks. Their appearance, particularly the manner in which they had been wrapped, also indicated that there was a good chance that the parcels contained something valuable, such as cash (Tr. 181-183). Helton inserted the 12 parcels in a canvas mail bag and filled out a "manifold bill" listing the parcels and (falsely) reflecting a rotary lock number as being affixed to the bag (Tr. 135-136, 138, 140).[3] Helton then placed the canvas bag on the floor beside her and indicated to petitioner that it was the one she had made for removal (Tr. 142).

Minutes later, Marchione arrived and assisted petitioner in loading a nylon bag containing a heavy canvas bag, as well as several empty nylon bags, onto a truck backed up to a flight deck (Tr. 318-323, 325-326). The truck was then moved by another employee (Tr. 326-327). After about an hour, petitioner approached Marchione and asked him to unload the truck (Tr. 327-328). As Marchione unloaded the nylon bags, he noticed that the one containing the canvas bag was no longer there (Tr. 331-333).

Later that morning, petitioner arranged to meet Marchione on a street outside the airport. As Marchione entered petitioner's automobile, petitioner told him that "he made the big one" and that Marchione and another person, whose identity petitioner refused to disclose, would each receive $30,000 (Tr. 334). Petitioner then gave Marchione a paper bag containing $22,000 (Tr. 335-336, 339).[4] On the same day petitioner gave Helton approximately $200,000 (Tr. 142-147, 159-163, 495).

---

[3]Helton took home the rotary lock listed on the bill and gave it to petitioner, who disposed of it (Tr. 146-147).

[4]Marchione also found inside the bag a piece of paper marked "Attention, Chief Teller, 1 Chase Manhattan Plaza" (Tr. 337). When advised of this, petitioner told Marchione not to worry and gave him an additional $8,000 (Tr. 339-340).

Between November 1975 and February 1976, petitioner bought expensive gifts for Helton and himself and gave her large amounts of cash (Tr. 151-153, 227-228, 248). In addition, petitioner purchased a group of garden apartments for $500,000. He appeared at the closing with $100,000 in cash, which the mortgagee required him to convert to a check (Tr. 287-295; G. X. 12).

In March 1976, when Helton was interviewed by postal inspectors, she denied any knowledge concerning the disappearance of the 12 mail parcels (Tr. 155-157). Following the interview, petitioner reassured her that as long as the money was not found she could not be held accountable for the crime (Tr. 157-158). On May 17, 1976, petitioner asked Helton to give him $40,000 from her share of the thefts. Accordingly, they drove to Granville, New York, where Helton had buried her money, and retrieved the cash (Tr. 159-160, 476-483). Helton was arrested seven days later and agreed to cooperate with the government (Tr. 158, 164).

ARGUMENT

Petitioner contends that the government breached its obligations under *Brady* v. *Maryland*, 373 U.S. 83, and the Jencks Act (18 U.S.C. 3500) by withholding until after the jury had retired the grand jury testimony of Postal Inspector Edmund Mullins and a form that petitioner had filed with the Internal Revenue Service. The district court and the court of appeals rejected this contention, however, and the record wholly fails to support it.

1. While the jury was deliberating, government counsel realized that he had inadvertently failed to provide petitioner with the grand jury testimony of Postal Inspector Edmund Mullins after Inspector Mullins had testified on

direct examination (Pet. App. 54a-55a).[5] Immediately following this discovery, defense counsel was given the material and was permitted to re-examine Inspector Mullins out of the jury's presence to determine what additional facts he would have been able to develop with the use of the grand jury testimony (*id.* at 64a-91a). Following this examination, the district court found (*id.* at 129a-130a) that the nondisclosure of the grand jury testimony did not violate *Brady* v. *Maryland, supra,* because there was nothing exculpatory in either that testimony or the cross-examination of Inspector Mullins based upon it.[6] The court also held that the government had not violated the Jencks Act, 18 U.S.C. 3500. Noting that that statute requires the production of a witness's statements relating to the subject matter of his direct testimony only upon motion of the defendant, the court found that "[n]o such motion was made" (Pet. App. 130a) and that, in any event,

[5]The prosecutor explained that he believed his oversight had been caused by the circumstances surrounding Inspector Mullins' direct examination (Pet. App. 54a-56a). At the district court's request, the scope of the government's direct examination of Inspector Mullins had been extremely limited, disclosing essentially that Mullins was the case agent responsible for coordinating the investigation and that, although surveillance cameras had been installed in the Registry Section after Short went to the postal authorities, they were not in operation on the day of the crime (see *id.* at 7a-12a). Following this testimony, the defense made no request for Inspector Mullins' Jencks Act materials. Petitioner then commenced cross-examination of Inspector Mullins and was permitted to go into matters beyond the scope of the direct examination (see *id.* at 13a-46a). In the course of this occurrence, the prosecutor neglected to carry out his intention to provide the defense with Inspector Mullins' grand jury testimony. The court eventually concluded that this failure had been negligent rather than intentional (*id.* at 134a).

[6]The court observed, moreover, that certain technical information supplied by Inspector Mullins to the grand jury had been equally available to petitioner, who was himself an experienced supervisory postal employee (Pet. App. 129a).

the grand jury testimony did not pertain to the subject of Inspector Mullins' direct testimony (*id.* at 130a-131a). Finally, the trial judge concluded that, even if petitioner had been entitled to the grand jury testimony, "beyond any reasonable doubt * * * this information could not have affected the verdict except [to] make a verdict of guilty more probable" (*id.* at 92a). The record amply supports this determination.

Inspector Mullins' grand jury testimony indicated, *inter alia,* that the ten mail parcels from Italy had arrived in the vault room of the Registry Section at 4:30 a.m. on September 22, 1975 (Pet. App. 111a). Petitioner contends (Pet. 20-22) that if he had been aware of this evidence he could have argued to the jury that the crime could not have occurred as Helton and Marchione had testified, because the parcels would have arrived as petitioner was returning from and Marchione and Helton were leaving for lunch. Since the time cards indicated that petitioner did not punch out again until his duty shift ended at 8:30 a.m., petitioner argues that he could not have spoken to Marchione about the parcels during the latter's lunch break.

Petitioner fails to note, however, that he made this same assertion to the jury at trial, based on the fact that Marchione went to lunch after petitioner had returned (and purportedly did not leave his work place again until 8:30 a.m.) (Tr. 544-546). The jury's verdict shows that it rejected the argument. But more important, the arrival of the packages from Italy at 4:30 a.m. was immaterial to whether petitioner had the conversation in question with Marchione. Petitioner's lunchroom discussion with Marchione referred to mail from Miami to the British West Indies, rather than from Italy, and nothing in the record suggests that the parcels going to the West Indies did not arrive considerably earlier than 4:30 in the morning. Moreover, the only evidence as to time of arrival of the parcels from Italy

concerned their receipt in the *vault room*, not their arrival at the Registry Section area that was under petitioner's general supervision. Finally, the evidence established that petitioner's time cards on the day in question were punched not by petitioner but by a technician on the basis of forms petitioner had subsequently submitted (Tr. 274-281). Thus, petitioner could have eaten lunch at a time other than he alleged or could have left the Registry Section at a time not indicated on his time card.[7]

Petitioner's further contention (Pet. 22-25) that Inspector Mullins' grand jury testimony would have permitted an argument that the parcels from Italy could not have been handled by Helton because they were insured rather than registered mail is similarly unavailing. Inspector Mullins told the grand jury that insured parcels from Italy are processed as registered mail (Pet. App. 109a). Accordingly, Helton would have assembled the parcels in question in a registered mail bag (*id.* at 68a).[8] In any event, the manifold bill and vault book entry prepared by Helton at

---

[7]Contrary to petitioner's assertion (Pet. 21), the arrival of the parcels from Italy at 4:30 a.m. did nothing to undermine the government's claim that he had spoken to Marchione before learning that Helton was ready to cooperate. As the district court noted (Pet. App. 73a), the evidence indicated that petitioner enlisted Marchione's aid in the expectation that Helton would assemble a mail bag containing valuable items (whether from Italy or elsewhere). The fact that the mail bag she put together included the parcels from Italy was entirely fortuitous (*id.* at 71a).

[8]Although petitioner claimed during trial to have information refuting this testimony of Inspector Mullins (Pet. App. 69a), he has never attempted to elaborate upon or to support that claim. Moreover, during pretrial discovery, the prosecution had provided the defense with a post office logistics order reflecting that insured mail from Italy was to be processed as domestic registered mail (*id.* at 65a).

the time she put together the mail bag (G.X. 6, 7) clearly established that Helton had handled these parcels and thus corroborated her testimony at trial.

2. In January 1976, when petitioner sought to use $100,000 in cash as a down payment on the garden apartments he had purchased, the mortgagee requested that he convert the cash into a bank check (Tr. 291-294). In obtaining the check from the bank, petitioner executed an Internal Revenue Service form reflecting the transaction. Petitioner contends (Pet. 11-20) that the government intentionally withheld this form and that, if it had been provided, it would have created a reasonable doubt as to his complicity in the embezzlement because it would have indicated "a total lack of consciousness of guilt" (Pet. 17).

The district court correctly dismissed these claims as "without any substance at all" (Pet. App. 100a). Rather than being exculpatory, the I.R.S. form was further evidence of petitioner's involvement in the crime, since the last digit of the social security number on the form did not match petitioner's number. This discrepancy, as the court observed (*id.* at 84a), "would have been absolutely murderous" to the defense, because it would have tended to show that petitioner attempted to conceal his identity on the form (see *id.* at 120a).

Although at one point the trial judge suggested that the form should nevertheless have been produced (*id.* at 92a), he later concluded that the material was "so detrimental [to the defense] that [the nonproduction] really [did not] make any difference" (*id.* at 94a). Furthermore, the court correctly determined that the material was equally available to the defense and that there had been no "neglect on the part of

the government" in not producing it (*id.* at 126a).[9] As this Court remarked in *United States* v. *Agurs*, 427 U.S. 97, 109, n.16, quoting from *Giles* v. *Maryland*, 386 U.S. 66, 98 (Fortas, J., concurring), there is of course no *Brady* violation in failing to disclose material "otherwise known to the defense." See also *id.* at 103 (*Brady* rule "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense"); *United States* v. *Ross*, 511 F. 2d 757, 763 (C.A. 5), certiorari denied, 423 U.S. 836; *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939.

Finally, as the district court noted (Pet. App. 128a), the evidence was merely cumulative of other evidence supporting petitioner's contention (which *was* presented to the jury, see Tr. 555-560) that his use of a substantial amount of cash in purchasing the apartment building was completely open and innocent. Accordingly, even if the form had been provided to petitioner and introduced at trial, it would not have created a reasonable doubt as to petitioner's guilt. *United States* v. *Agurs, supra*, 427 U.S. at 112-113.[10]

---

[9]There is no merit to petitioner's allegation (Pet. 12, 15) that he made a specific demand for the form. The defense request concerned information regarding petitioner's assets obtained from banks with whom he had accounts (Pet. App. 31a-32a). The court inspected summary sheets compiled by the government from petitioner's bank records and concluded that the material was "work product information otherwise available to the" defense (*id.* at 32a). In sum, petitioner's general request for "whatever you've got" (*id.* at 31a) was the equivalent of no request at all. See *United States* v. *Agurs*, 427 U.S. 97, 107.

[10]Petitioner argues (Pet. 18-20) that virtually identical, conclusory affidavits obtained in *ex parte* interviews with several of the jurors (see Pet. App. 138a-148a) should have been considered by the district court in assessing the materiality of the I.R.S. form. As we have noted, since non-production of that form did not constitute a *Brady* violation, it was unnecessary to determine its materiality. However, the district court proceeded to do so and, applying an objective standard, concluded that the evidence did not create a reasonable doubt about petitioner's guilt. The court correctly held that Rule 606(b) of the Federal Rules of Evidence prevented consideration of the affidavits, but that, even if the affidavits had been admissible, it would have given them "no weight at all" (Pet. App. 131a). See generally *McDonald* v. *Pless*, 238 U.S. 264, 267; *Mattox* v. *United States*, 146 U.S. 140, 149.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
KATHERINE WINFREE,
Attorneys.

SEPTEMBER 1977.

DOJ-1977-09